(19)

Supreme Court of the United States

No. 877.

OCTOBER TERM, 1943.

H. HIGHFILL AND VALLEY CREDIT COMPANY, A CORPORATION, PETITIONERS,

VS.

LULU J. DILATUSH, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ARCHER WHEATLEY,
Jonesboro, Arkansas,
Attorney for Petitioners.

HERBERT GANNAWAY,
Memphis, Tennessee,
Of Counsel.

INDEX

CASES AND AUTHORITIES CITED

STATUTES CITED

Supreme Court of the United States

No. .....

OCTOBER TERM, 1943.

H. HIGHFILL AND VALLEY CREDIT COMPANY, A CORPORATION, PETITIONERS,

VS.

LULU J. DILATUSH, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, H. Highfill, a resident and citizen of the Eastern District of Arkansas, and Valley Credit Company, a corporation organized under the laws of Missouri, and domiciled therein, pray this Court for the issuance of a Writ of Certiorari to the Circuit Court of Appeals for the Eighth Circuit, to review a final judgment of said Circuit Court of Appeals reversing an order and judgment of the District Court of the United States for the Jonesboro Division of the Eastern District of Arkansas.

The judgment of the Circuit Court of Appeals was rendered on the 2d day of February, 1944, and petition for rehearing was by said Court denied on the 1st day of March, 1944.

I.

STATEMENT OF THE MATTER INVOLVED.

Respondent Lulu J. Dilatush, a resident and citizen of Illinois, sued these petitioners and her son R. E. Dilatush, a resident and citizen of the Eastern District of Arkansas, of which District Petitioner H. Highfill is also a resident and citizen, in the District Court of the United States for the Jonesboro Division of the Eastern District of Arkansas. She alleged that by false and fraudulent representations defendants had secured from her certain notes aggregating $23,000 which had been executed by her said son, promising to foreclose the deed of trust securing these notes and then give her new security or to pay the notes; that the land (security) had been sold and she had not been paid.

Petitioners moved the District Court for a re-alignment of parties because there was no actual controversy between the plaintiff (respondent Lulu J. Dilatush) and defendant R. E. Dilatush; that he was a resident and citizen of the same state (Arkansas) as his co-defendant H. Highfill.

The depositions of Lulu J. Dilatush and R. E. Dilatush were taken by petitioners; the deposition of H. Highfill by respondent, and respondent's attorney J. Clifton Banta testified in open court. From undisputed facts the District Court found (Tr. 14):

> "1. The plaintiff Lulu J. Dilatush is the mother of defendant R. E. Dilatush.

2. Defendant R. E. Dilatush is insolvent.

3. Defendant R. E. Dilatush is the one who has taken all active steps in the institution and prosecution of this suit. He selected his own personal lawyer to represent his mother, the plaintiff, first interviewed him about the employment, held numerous conferences with him about it, gave him access to his files, furnished such other information as was necessary to the bringing of this suit and its prosecution, and returned from California to testify on behalf of the plaintiff.

4. Defendant R. E. Dilatush is a citizen of the same state as the defendant H. Highfill, to-wit: the State of Arkansas.

5. All the interest that R. E. Dilatush has in this suit is upon the side of the plaintiff, and any possible benefit that might accrue to him, if any, would be dependent upon the success of the plaintiff in securing and collecting a judgment.

6. Defendant R. E. Dilatush was a member of the partnership with H. Highfill, which partnership is an issue in this suit.

7. There is no collision or conflict of interest between the plaintiff Lulu J. Dilatush and defendant R. E. Dilatush."

From these facts, the Court concluded the law to be that re-alignment of the parties was necessary, placing the son R. E. Dilatush with his mother as plaintiff; that this destroyed diversity of citizenship; and that the suit must be dismissed for want of jurisdiction, which was done (Tr. 15).

The Circuit Court of Appeals held that notwithstanding the activity of defendant R. E. Dilatush in behalf of the plaintiff, the fact that he owed her and she was entitled to take a judgment against him constituted a "con-

troversy" within the purview of Section 24, Judicial Code, 28 U. S. C. A. 41, Par. 1, and a "conflict of interest" (Tr. 47, 54).

The conviction that this declaration of law is contrary to the decisions of this Court, and of other Circuit Courts of Appeal is the basis for this petition.

II.

REASONS FOR GRANTING THE WRIT.

(a) The decision of the Circuit Court of Appeals is in conflict with the applicable decisions of the Supreme Court:

1. In holding that "as each and all of them have failed and refused to pay, it is manifest that controversy exists between her and each of them, and it is immaterial whether the controversy arises from defendants' denial of liability, or from their unwillingness to pay or from their inability to do so, or from all such causes" (Tr. 53).

Indianapolis v. *Chase National Bank*, 314 U. S. 63, 72, 86 L. Ed. 47, 51.

2. In holding as contrary to the evidence the finding of the trial court that there was no collision or conflict of interest between the plaintiff and her son (Tr. 54).

Indianapolis v. *Chase National Bank, supra.*

3. In holding that a suit "by one who charges refusal by another to pay a debt claimed to be due from him, presents the conflict of interest that constitutes a controversy between the party plaintiff and the party defendant under the Statute. 28 U. S. C. A. 41, Par. 1" (Tr. 54).

Dawson v. *Columbia Avenue Savings Fund, etc., Co.*, 197 U. S. 178, 49 L. Ed. 713.

Indianapolis v. *Chase National Bank, supra.*

Niles-Bement-Pond Company v. *Iron Moulders Union*, 254 U. S. 77, 65 L. Ed. 145.

Steele v. *Culver*, 211 U. S. 26, 53 L. Ed. 74.

4. In holding that R. E. Dilatush "has no interest on the plaintiff's side in the law suit his mother has brought against him and others to justify aligning him on her side as a party plaintiff" (Tr. 54).

Dixie Cotton Oil Co. v. *Morris*, 79 Ark. 113, 94 S. W. 933.

Garner v. *Hallum*, 169 Ark. 295, 273 S. W. 1025.

(b) The Circuit Court of Appeals has so far departed from accepted procedure in an important matter affecting procedure generally throughout the country, as to call for the exercise of the power of supervision by the Supreme Court.

Dawson v. *Columbia Avenue Saving Fund, etc., Co., supra.*

De Graffenried v. *Yount-Lee Oil Co.*, (5 Cir.) 30 F. 2d 574.

Edwards v. *Glasscock*, (5 Cir.) 91 F. 2d 625.

Farr v. *Detroit Trust Co.*, (6 Cir.) 116 F. 2d 807, 811.

Fidelity Bond & Mtg. Co. v. *Grand Lodge, I. O. O. F.*, (6 Cir.) 41 F. 2d 326.

Indianapolis v. *Chase National Bank, supra.*

Lee v. *Lehigh Valley Coal Company*, 267 U. S. 542, 69 L. Ed. 782.

Maryland Casualty Co. v. *Boyle Constr. Co.*, (4 Cir.) 123 F. 2d 558.

Mitchell v. *Maurer*, 293 U. S. 237, 79 L. Ed. 339.

State Farm Mutual Automobile Ins. Co. v. *Hugee*, (4 Cir.) 115 F. 2d 293, 300, 132 A. L. R. 188.

United States v. *Johnson*, 319 U. S. 302, 87 L. Ed. 1413.

Wherefore, your petitioners pray that a Writ of Certiorari issue under the seal of this Court, directed to the Honorable Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 12716 Civil, "Lulu J. Dilatush, Appellant, vs. H. Highfill, Valley Credit Company, a corporation, and R. E. Dilatush, Appellees," to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem proper.

ARCHER WHEATLEY,
Jonesboro, Arkansas,
Attorney for Petitioners.

Dated April 7, 1944.

Supreme Court of the United States

No. .....

OCTOBER TERM, 1943.

H. HIGHFILL AND VALLEY CREDIT COMPANY, A CORPORATION, PETITIONERS,

VS.

LULU J. DILATUSH, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

1.

THE OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (Tr. 47)—not yet reported—will be reported as Lulu J. Dilatush, Appellant, vs. H. Highfill, Valley Credit Company, a Corporation, and R. E. Dilatush, Appellees, ... F. 2d .....

2.

JURISDICTION.

(1) The date of the judgment to be reviewed is February 2, 1944 (Tr. 48).

(2) Petition for Re-hearing was filed February 16, 1944 (Tr. 65), and was denied March 1, 1944 (Tr. 67).

(3) Plaintiff Lulu J. Dilatush, a resident and citizen of Illinois, sued H. Highfill, and R. E. Dilatush, each a resident and citizen of Arkansas, and Valley Credit Company, a corporation of Missouri, in the District Court for the Jonesboro Division of the Eastern District of Arkansas, alleging fraud in the procurement of certain notes secured by deed of trust on land in Missouri owned by the son of plaintiff, R. E. Dilatush.

The testimony of plaintiff, of her son, and of her attorney, developed facts from which findings were made by the District Court (*supra*, Statement of Case, in Petition). Motion for re-alignment of parties was granted, with dismissal of the suit (Tr. 15, 20). Plaintiff appealed to the Circuit Court of Appeals for the Eighth Circuit, which reversed the decision of the District Court, February 2, 1944, and on March 1, 1944, denied the petition for re-hearing.

This application is made within three months after the over-ruling of said motion for a re-hearing and after the entry of the decree sought to be reviewed by this Court.

4. The jurisdiction of this Court is invoked under the provisions of Section 240 of the Judicial Code, 28 U. S. C. A., Sec. 347 (a), and Section 262 of the Judicial Code, 28 U. S. C. A. 377.

Cases believed to sustain said jurisdiction are as follows:

Bradford Electric Light Co. v. *Clapper*, 284 U. S. 221, 76 L. Ed. 254.

Connecticut Ry. & Light Co. v. *Palmer*, 305 U. S. 493, 494, 83 L. Ed. 309, 311.

Ecker v. *Western Pacific Railroad Corpn.*, 318 U. S. 448, 489, 87 L. Ed. 892, 940.

Gray v. *Powell*, 314 U. S. 402, 406, 86 L. Ed. 301, 307.

Helis v. *Ward*, 308 U. S. 365, 84 L. Ed. 327.

Indianapolis v. *Chase National Bank*, 314 U. S. 63, 72, 86 L. Ed. 47, 51.

Re 620 Church Street Building Corpn., 299 U. S. 24, 26, 81 L. Ed. 16, 19

3.

STATEMENT OF THE CASE.

To the summary statement given under heading 1 in the Petition, which is hereby adopted and made a part of this brief, we add the following:

R. E. Dilatush purchased a plantation in Missouri, subject to a first lien of nearly fifty thousand dollars, and giving to his vendor Claud Green a second lien against the land. His operations were not successful. Third and fourth liens were given to Valley Credit Company and Clay County Cotton Company (Tr. 32). He also had financial trouble with his wife, from whom he was separated (Tr. 34). In June, 1938, he wrote his mother, Respondent, that he had executed in her favor notes for $10,000 and $13,000, and a deed of trust securing them, saying: "I am merely doing this as a safeguard although Eda did not sign the deed of trust title

could not pass on this plantation without paying this off. So long as you can prove it was not a frame-up" (Tr. 31).

A judgment was taken against R. E. Dilatush by an oil dealer named Brown Little, and all the land was sold under execution for a nominal sum (Tr. 32).

R. E. Dilatush and H. Highfill signed a partnership agreement December 19, 1938, by which Dilatush agreed to furnish the land mentioned subject only to those liens prior to the deed of trust he had given his mother, listed as totaling $61,800. Highfill was general manager of Valley Credit Company and testified he was acting in its behalf so he could supervise the farming operations (Tr. 36, 37); that R. E. Dilatush said he would deliver the notes, and that there was never any suggestion of payment to Respondent; had there been, the transaction would not have been considered (Tr. 38). Funds were advanced by Valley Credit Company to take assignments of the liens of Clay County Cotton Company and Claud Green, and to pay personal unsecured accounts of R. E. Dilatush in excess of $7,000 (Tr. 38). R. E. Dilatush delivered the notes to H. Highfill, the deed of trust was foreclosed and the land purchased in the name of H. Highfill (Tr. 37), who agreed that upon demand he would re-convey to R. E. Dilatush a half interest in the land, subject only to the liens prior to the deed of trust given to Respondent (Tr. 42).

Although large additional amounts were advanced by Valley Credit Company to finance his farm operations, Dilatush was not successful, and it was decided to sell the land. He assisted in making the sale. The proceeds were insufficient to discharge his debt to Valley Credit Company, and a mortgage on his farm chattels was foreclosed. He was present at the sale and gave personal approval to the proceedings (Tr. 35). This still did not pay all his debt to Valley Credit Company.

Thereafter R. E. Dilatush consulted with his attorney about bringing this suit in the mother's name. She testified:

> "No representations of any kind were ever made to me in connection with these notes by any of the defendants other than my son. He came up here and got me to sign the notes over to Mr. Highfill (Tr. 26).
>
> "He said he would be back for the hearing whenever they bring the case to trial. Ever since the land was sold (meaning other land in Arkansas) my son has looked after all of my business affairs in that part of the country as I couldn't do it, it is too far from home. HE HAS LOOKED AFTER THIS LITIGATION FOR ME (Tr. 28).
>
> "My son said he would be back for the trial. I am depending on him to be there because he knows more about the case than I do; he knows what he has been doing and how he handled the business down there, and I was so far away I couldn't keep track of matters; I just depended upon him to look after my business" (Tr. 30).

W. Clifton Banta, one of Respondent's attorneys, testified:

> "The firm of Ashby and Banta had represented R. E. Dilatush prior to the bringing of these law suits. I had personally handled most of his litigation, however. The first information I had regarding this suit came from R. E. Dilatush. He talked to me about the case, giving me a full statement of the facts on which the complaints filed were based, and asked me if I would represent his mother. I said I would and we entered into a contract with her (Tr. 25).
>
> "Mr. Dilatush has let us have access to his files and has at all times been cooperative with us in connection with this litigation. We have also conferred with him regarding the same. He has manifested the same interest in behalf of his mother that the ordinary son would have.

"I would consider him insolvent at this time" (Tr. 26).

4.

SPECIFICATION OF ERRORS.

For their Specification of such Assigned Errors as are intended to be urged, petitioners adopt, and ask that they be considered a part hereof, the assignments set out in part II (a) of the Petition for the Writ, entitled "Reasons for Granting the Writ."

5.

SUMMARY OF ARGUMENT.

The argument is directed to showing that

1. The conduct of defendant R. E. Dilatush in behalf of the plaintiff (Respondent) in this litigation has been such as to require re-alignment of parties, placing him with plaintiff and thereby destroying Federal jurisdiction;

2. The decision of the Circuit Court of Appeals for the Eighth Circuit reversing the findings of fact and conclusions of law of the District Court to this effect was in conflict with applicable decisions of this Court and of usual procedure.

ARGUMENT.

The argument for the reasons for granting the Petition for a Writ of Certiorari will be taken up in the order that the reasons were presented in the Petition.

A.

The Decision of the Circuit Court of Appeals Is in Conflict with the Applicable Decisions of the Supreme Court.

1. In holding that "As each and all of them have failed and refused to pay, it is manifest that controversy exists between her and each of them, and it is immaterial whether the controversy arises from defendants' denial of liability or from their unwillingness to pay or from their inability to do so, or from all such causes" (Tr. 53).

This holding that indebtedness alone constitutes a sufficient "controversy" to sustain Federal jurisdiction is in conflict with decisions of this Court. It is manifest that the primary purpose of Respondent's suit is to take a judgment against petitioners; she is not interested in a judgment against her insolvent son.

In *Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 72, 86 L. Ed. 47, 51, defendant Indianapolis Gas Company had defaulted in the payment of a debt for which Chase National Bank was Trustee. The Trustee prayed for judgment on the unpaid coupons. Yet this Court held that the fundamental issue was the obligation of the City of Indianapolis, and not the indebtedness of Indianapolis Gas Company; that

> "Chase and Indianapolis Gas have always been united on this issue; both have always contended for the validity of the lease and the City's obligation under it. * * * Plainly, therefore, Chase and Indianapolis Gas were, colloquially speaking, partners in litigation."

The Honorable Circuit Court of Appeals therefore erred in holding that indebtedness and prayer for judgment constitute a "controversy" between respondent and her son.

2. The circuit court of appeals erred in holding as contrary to the evidence the finding of the trial court that there was no collision or conflict of interest between the plaintiff (respondent) and her son (Tr. 54).

This holding was also in conflict with the *Chase Case, supra.* As stated in the latter:

> "What Chase wants, Indianapolis Gas wants, and the City does not want. Yet the City and Indianapolis Gas were made to have a common interest against Chase, when, as a matter of fact, the interest of the City and of Indianapolis Gas are opposed to one another."

A sufficient argument on this point is to use the quoted words with substitution of characters from this case:

> "What Lulu J. Dilatush wants, R. E. Dilatush wants, and Petitioners do not want. Yet Petitioners and R. E. Dilatush were made to have a common interest against plaintiff, when, as a matter of fact, the interests of R. E. Dilatush and Petitioners are opposed to one another."

3. The circuit court of appeals erred in holding that a suit "by one who charges refusal by another to pay a debt claimed to be due from him, presents the conflict interest that constitutes a controversy between the party plaintiff and the party defendant under the statute. 28 U. S. C. A. 41, Par. 1" (Tr. 54).

By this holding, the Circuit Court of Appeals again went contrary to the law as announced in the *Chase Case, supra.* Indianapolis Gas Company owed Chase National Bank as Trustee; the latter sued on this particular debt; but since the principal object of the suit was

not a judgment in favor of Chase against Indianapolis Gas, but one against City of Indianapolis (something which both Chase and Indianapolis Gas desired), there was no "controversy" between Chase and Indianapolis Gas. So, here, the fundamental purpose of the suit by Lulu J. Dilatush is a judgment against petitioners. She and her son both want that. A judgment against R. E. Dilatush is merely incidental, thought necessary in order to recover against petitioners, and is desired for no other purpose. There is no controversy between petitioner and her son.

Dawson v. *Columbia Avenue Saving Fund, etc., Co.*, 197 U. S. 178, 49 L. Ed. 713.

This suit arose over an indebtedness of Dawson Waterworks Company to the Trust Company, in connection with water works bonds, but was aimed primarily at the City of Dawson. The Court said:

> "We are of opinion that the bill should have been dismissed for want of jurisdiction. The waterworks company is admitted to have been a necessary party, and it, like the defendant city, was a Georgia corporation. It was made a defendant, but the court will look beyond the pleadings, and arrange the parties according to their sides in the dispute. * * * There was a pretense of asking relief against it, as we have stated, but no foundation for the prayer was laid in the allegations of the bill. On the contrary, it appears from those allegations that the waterworks company insisted on its contract with the city, and did everything in its power to carry the contract out. It also recognized the plaintiff's right to receive the rentals, and yielded to its demand. No difference or collision of interest or action is alleged or even suggested."

This Court will look beyond the "pretense of asking relief" against R. E. Dilatush, and will see that he insists

on the liability of his co-defendants (although they never had any contact with his mother); that he recognizes her pretended right to a judgment; and that there is no actual difference or collision of interest or action between them.

Niles-Bement-Pond v. *Iron Moulders Union*, 254 U. S. 77, 65 L. Ed. 145.

After defining an "indispensable party" as one having such an interest that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience, the Court said:

> "That there was not, and could not be, any substantial controversy, any 'collision of interest,' between the petitioner and the Tool Company is, of course, obvious from the potential control which the ownership of stock by the former gave it over the latter company, etc."

With petitioner's sworn statement that she had turned all her business over to R. E. Dilatush, and that he was managing the litigation for her, we do not believe a controversy between them possible, in a legal sense.

> "Looking, as the court must, beyond the pleadings, and arranging the parties according to their real interest in the dispute involved in the case (citations) it is clear that the identity of interest of the Tool Company with the petitioner required that the two be aligned as plaintiffs, and that with them so classified, the case did not present a controversy wholly between citizens of different states, within the jurisdiction of the district court."

Steele v. *Culver*, 211 U. S. 26, 53 L. Ed. 74, was a suit to prohibit the collection of two separate judgments, one

against a railway company and the other against the surety on an appeal bond given by the railway. Realignment was asked because the railway was a necessary party and its interests were all on the side of the plaintiff. In a decision written by Mr. Justice Holmes it is stated that the parties may be arranged according to their real interests; that "the railroad was sole master of the litigation against itself and we must assume is cooperating with the plaintiff in the present case." The testimony of respondent, of her son, of her attorney, the finding of facts by the trial Court, the recital of facts by the Circuit Court of Appeals, all show that the real interest and desire of R. E. Dilatush are that a judgment be rendered in favor of his mother, the respondent. They show that if he was not "sole master of the litigation" against himself, he at least selected the attorney by whom he wished to be sued, gave him the statement from which the charge of fraud was framed, delivered to him or to his mother for him all of his files and records, conferred with him frequently, and returned from California to Arkansas to testify, in an effort to make effectual the charges of fraud with which he had besmeared himself!

4. The decision of the circuit court of appeals was in conflict with applicable decisions of this court in holding that R. E. Dilatush "has no interest on the plaintiff's side in the law suit his mother has brought against him and others to justify re-aligning him on her side as a party plaintiff."

R. E. Dilatush entered into a partnership agreement with H. Highfill in consideration of which large amounts of money were advanced by petitioners. By this agreement he bound himself to furnish the land free of the lien then held by his mother (Tr. 38). The partnership contract was an Arkansas contract. The Supreme Court

of that State holds that a partnership is not liable for money borowed to buy an interest in the firm.

Dixie Cotton Oil Co. v. *Morris,* 79 Ark. 113, 94 S. W. 933.

Garner v. *Hallum,* 169 Ark. 295, 273 S. W. 1025.

Since R. E. Dilatush agreed to furnish the land to the partnership free of the lien of his mother's deed of trust, if he made an agreement with her as claimed by the complaint, it was for his own benefit, and he certainly has an interest in having these petitioners discharge the obligation which he owes to his mother.

In each of the cases cited under subdivision (3) *supra*, re-alignment was granted on account of the actual interest of a defendant although there was a "pretense of asking relief" against that defendant. However, in none of those cases did it appear that the defendant had openly and admittedly taken the active steps in behalf of the plaintiff that R. E. Dilatush has taken in this case in behalf of the plaintiff and against his co-defendants (petitioners).

B.

The Circuit Court of Appeals Has So Far Departed from Accepted Procedure in an Important Matter Affecting Procedure Generally Throughout the County, As to Call for the Exercise of the Power of Supervision by the Supreme Court.

The question of jurisdiction is always the primary one in Federal procedure. This Court has repeatedly held that resort should be had to the actual facts of the case to determine the real interest of the parties, and that they should be aligned accordingly, regardless of the pleadings filed in the case. It is, therefore, a matter of general concern as to whether the Federal jurisdiction may

be invoked simply because a plaintiff is entitled to a judgment against a particular defendant, when that defendant is actually and openly engaged in behalf of the plaintiff and against his co-defendants, and, as plaintiff states, "He has looked after this litigation for me" (Tr. 28).

If the defendant R. E. Dilatush had filed an answer asking for the relief demanded by his mother as plaintiff, there could be no question regarding the re-alignment:

Dawson v. *Columbia Ave. Saving Fund, etc., Co., supra.*

Indianapolis v. *Chase National Bank, supra.*

Edwards v. *Glasscock,* (5 Cir.) 91 F. 2d 625.

Since the Court is no longer restricted to the pleadings in determining the actual interest of the parties, there should be applied to the conduct of R. E. Dilatush in behalf of respondent the old saying "What you are speaks so loud I can not hear what you say!" Certainly, notorious activity by a defendant in behalf of a plaintiff should be given more consideration than a mere answer admitting that the plaintiff is entitled to the relief asked.

Mitchell v. *Maurer,* 293 U. S. 237, 79 L. Ed. 339.

Fidelity Bond & Mtg. Co. v. *Grand Lodge I. O. O. F.,* (6 Cir.) 41 F. 2d 326.

Maryland Casualty Co. v. *Boyle Constr. Co.,* (4 Cir.) 123 F. 2d 558.

State Farm Mut. Automobile Ins. Co. v. *Hugee,* (4 Cir.) 115 F. 2d 293, 300, 132 A. L. R. 188.

De Graffenried v. *Yount-Lee Oil Co.,* (5 Cir.) 30 F. 2d 574, cert. den. 279 U. S. 865, 73 L. Ed. 1003.

Farr v. *Detroit Trust Co.,* (6 Cir.) 116 F. 2d 807, 811.

In the recent case of *United States* v. *Johnson,* 319 U. S. 302, 87 L. Ed. 1413, there was a genuine desire on

the part of Johnson to secure a judicial determination of the validity of the Emergency Price Control Act. He selected counsel to file suit against himself, hoping to obtain this determination. The Government did not contend any false or fictitious statement of facts was submitted to the court, but this Court said: "such a suit is collusive because it is not in any real sense adversary. It does not assume the honest and actual antagonistic assertion of rights—a safeguard essential to the integrity of the judicial process" and directed dismissal of the suit as collusive.

The complaint here alleges fraud. Respondent and her son both admit she had no contact concerning the matter with any one other than the son; therefore any possible liability of petitioners comes through R. E. Dilatush. He is an indispensable party. He was made a party defendant by Respondent.

Lee v. *Lehigh Valley Coal Company*, 267 U. S. 542, 69 L. Ed. 782.

After referring to the rights of a defendant seeking to remove a suit from a state court to the District Court, the Court said:

> "It is a different question whether the plaintiff can repudiate the effect of his own joinder, can retain a party to the relief sought, and yet keep him on the wrong side in order to avoid the effect of his own act. Without inquiring whether the plaintiff could have maintained the suit alone had he so elected, and had he found it impossible to join Kate P. Dixon, obviously she was a 'necessary' even if not an indispensable party. *Shields* v. *Barrow*, 17 How. 130, 139, 15 L. Ed. 158, 160. It would be hard upon the Coal Company to compel it to submit to an adjudication upon the lease, upon a fraud alleged to have been committed against both owners, and to an account, in

the absence of one of the lessors. The joinder of both is much more than a mere form. As both are named, they must be arranged upon the side on which they belong. *Menefee* v. *Frost*, 123 Fed. 633; *Blacklock* v. *Small*, 127 U. S. 96, 32 L. Ed. 70, 8 Sup. Ct. Rep. 1096."

Conclusion.

The errors committed by the Honorable Circuit Court of Appeals for the Eighth Circuit and assigned by the petitioners were errors on points which were important and controlling in the decision of the Circuit Court of Appeals. It is believed that had the Circuit Court of Appeals held differently on any of these points its decision would not have been the same and the decision of the District Court would have been affirmed. It is also believed that the decision is in conflict with the established procedure of this Court and of other Circuit Courts of Appeal with reference to what constitutes a "controversy" sufficient to confer or sustain Federal jurisdiction.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a Writ of Certiorari and thereafter reviewing and reversing said decision.

ARCHER WHEATLEY,
Jonesboro, Arkansas,
Attorney for Petitioners.

HERBERT GANNAWAY,
Memphis, Tennessee,
Of Counsel.

(20)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

H. HIGHFILL and VALLEY CREDIT COMPANY, a Corporation,
Petitioners,
vs.
LULU J. DILATUSH,
Respondent.

No. 877

BRIEF

In Opposition to the Issuance of Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

E. L. WESTBROOKE,
Jonesboro, Arkansas,
Attorney for Respondent.

ROY SIGLER,
Jonesboro, Arkansas,
W. CLIFTON BANTA,
Charleston, Missouri,
J. M. HAW,
Charleston, Missouri,
Of Counsel.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

Cases Cited.

Statutes Cited.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

H. HIGHFILL and VALLEY CREDIT COMPANY, a Corporation,
Petitioners,
vs.
LULU J. DILATUSH,
Respondent.
No.....

BRIEF

In Opposition to the Issuance of Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

1.

THE OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (Tr. 47) is reported as Dilatush v. Highfill et al., 140 F. (2d) 741.

2.

JURISDICTION.

Respondent does not dispute the jurisdiction of this Court to hear the petition herein presented, but does contend, as will be brought out in her argument, that this is such a case that this Court, within its discretion, should

not assume jurisdiction and issue said writ of certiorari, as provided by Section 240 of the Judicial Code, 28 U. S. C. A., Sec. 347 (a), and Section 262 of the Judicial Code, 28 U. S. C. A. 377, and as held by this Court in the following cases, to wit:

Indianapolis v. Chase National Bank, 314 U. S. 63, 86 L. Ed. 47;
Wheeler v. City and County of Denver, 33 S. Ct. 842, 229 U. S. 342, 57 L. Ed. 1219.

3.

STATEMENT OF THE CASE.

Respondent cannot accept petitioners' statement of the case as it almost wholly omits such matters that are unfavorable to petitioners and favorable to this respondent. Respondent adopts, and asks that it be considered as her statement of the case, the statement made by the United States Circuit Court of Appeals for the Eighth Circuit, made by Woodrough, Circuit Judge, who delivered the opinion of the Court (Tr. 48-53).

4.

ARGUMENT.

A.

The decision of the Circuit Court of Appeals is not in conflict with the applicable decisions of the Supreme Court.

1. **In holding that "As each and all of them have failed and refused to pay, it is manifest that controversy exists between her and each of them, and it is immaterial whether the controversy arises from defendants' denial of liability or from their unwillingness to pay or from their inability to do so, or from all causes"** (Tr. 53).

In Indianapolis v. Chase National Bank, 314 U. S. 63, 86 L. Ed. 47, this Court, in discussing the same question, among other things, states as follows:

> "As is true of many problems in the law, the answer is to be found not in legal learning but in the realities of the record. Though variously expressed in the decisions, the governing principles are clear."

The United States Circuit Court of Appeals, in making the above statement objected to by petitioners, fully realized this primary fact in making that statement and in reaching their decision, i. e., each case must be decided upon its own facts. In this instant case all respondent Lulu J. Dilatush seeks and desires is to obtain a money judgment for the $23,000.00 (plus interest), which she originally loaned to her son. She wants her money back. Who owes to her the money, and how much, is the only controversy. She says that they all owe her. The defendants, as is often the case, point the finger of liability at each other. But, as the Circuit Court of Appeals said, since each and all of them have failed and refused to pay her, it is manifest that controversy exists between her and each of them. In Indianapolis v. Chase National Bank, supra, a much differ-

ent situation exists. There the judgment for debt was merely incidental. The real controversy was the validity of the lease in question, and it was because of that fact that the Court therein held as they did.

The facts are not comparable, and the decisions, therefore, are not in conflict.

2. **The Circuit Court of Appeals did not err in holding as contrary to the evidence the finding of the trial court that there was no collision or conflict of interest between the plaintiff (respondent) and her son** (Tr. 54).

Again this does not conflict with the holding in the Chase case, supra, as the facts are not comparable.

In the Chase case, Indianapolis Gas said in effect to Chase, "Yes, I owe you, but I can't pay you because I have leased my properties to Citizens Gas and the City. If the lease is valid they will have to pay me and then I can pay you, and I would like to see that happen, as my stockholders will profit also."

In this case R. E. Dilatush says to his mother, this respondent, in effect as follows: "Yes, I borrowed this money from you, and you have not been paid. My co-defendants, who were attempting to defeat my other creditors for their own benefit, told me to obtain the notes for them and they would assume the payment of them. Now, they owe you the money also. They are jointly obligated with me. They told me they would pay you and I conveyed their message to you. They actually received the benefit of your security as a result of the deal. Now, all I want is to see the obligation, which is a just one, paid, and that they pay it as agreed. I do not now owe you the money solely by myself, and I do not want you to get a money judgment against me alone, although I do want you to recover what is rightfully and justly yours."

3. **The Circuit Court of Appeals did not err in holding that a suit "by one who charges refusal by another to pay a debt claimed to be due from him presents the conflict of interest that constitutes a controversy between the party plaintiff and the party defendant under the statute. 28 U. S. C. A. 41, Par. 1"** (Tr. 54).

This statement is not contrary to the law as announced in the Chase Case, supra, for the reason that the facts are different. In the Chase case the debt sued on was merely incidental, the real question in dispute being the validity of the lease. Here the only question involved was the refusal of the three defendants to pay a debt which plaintiff (respondent) claims to be due to her. She has no other axe to grind that would benefit any of the defendants. Whether, of course, she can sustain her action against all of the defendants is a matter to be decided in a trial on the merits, and not in this proceedings, as the petitioners apparently are attempting to do.

4. **The decision of the Circuit Court of Appeals is not in conflict with applicable decisions of the Court in holding that R. E. Dilatush "has no interest on the plaintiff's side in the lawsuit his mother has brought against him and others to justify realigning him on her side as a party plaintiff."**

This is a simple suit for money obtained through fraud. The partnership mentioned by petitioners in their brief is not involved therein, as petitioners themselves admit (Tr. 37, bottom of page) that the agreement was not binding, but was made as protection against other creditors of R. E. Dilatush. The Circuit Court of Appeals, in making the above statement, is talking of legal interests. As stated by them (Tr. 55), "It is undoubtedly true that the son's filial feelings incline him to sympathize with his mother in

her loss and to hope for its restoration." That is a very fair and complete statement of his interest on his mother's side in this lawsuit. This is a quite different kind of interest from that which this Court found to be present in Indianapolis v. Chase National Bank, supra.

B.

The Circuit Court of Appeals has not so far departed from accepted procedure in an important matter affecting procedure generally throughout the country, as to call for the exercise of the power of supervision by the Supreme Court.

The Circuit Court of Appeals has expressly applied the facts in this case to the law as set forth by this Court in the case of Indianapolis v. Chase National Bank, supra (Tr. 55), and after applying said law found no basis for realignment. Their holding is the accepted procedure in cases where like facts exist.

Detroit Tile & Mosaic Co. v. Mason Contractors Ass'n, 48 F. (2d) 729;
Republic National Bank & Trust Co. v. Massachusetts Bonding & Ins. Co., 68 F. (2d) 445;
Staten v. Louisville Trust Co., 28 F. Supp. 301;
Stephens v. Ohio State Telephone Co., 240 F. 759;
Wheeler v. City and County of Denver, 33 S. Ct. 842, 229 U. S. 342, 57 L. Ed. 1219.

We think the Circuit Court of Appeals has applied the facts of the case fairly to the rule as laid down in the Chase Case, supra, and that the Federal Court in Arkansas had jurisdiction of this case, as by them held.

Petitioners state that the question of jurisdiction is always a primary one in federal procedure. The federal courts are also interested in seeing that justice is done.

The facts in this case show (Tr. 25) that this suit was originally brought in the Circuit Court of Mississippi County, Missouri, where certain notes given to secure the sale of the land in question in this suit were attached. That the notes were assigned and the suit was dismissed for lack of jurisdiction. That suit was then brought in the Circuit Court of Dunklin County, Missouri, which was the legal residence of defendant, Valley Credit Company. That said company did not have an officer, agent, or office in said county, or in the State of Missouri, as required by law; that service could not be obtained and the suit had to be dismissed. That suit was then brought in the District Court of the United States, Eastern District of Arkansas, Jonesboro Division, and service obtained on all defendants. Since that time all efforts of defendants, petitioners herein, have been made for the purpose of delay, and not for trial of the suit. Had suit been filed in the state courts of Arkansas, past conduct on the part of petitioners herein would lead this respondent to believe that petitioners' first act would have been the filing of a petition for removal to the federal court, which we think, according to law, would have had to have been sustained.

This respondent does not believe that the Honorable Circuit Court of Appeals has committed error. That this case has been fairly tried, and that it is not necessary or desirable from the standpoint of justice and the stabilizing of federal procedure that this writ of certiorari should issue and this case be given further review by this Court.

That justice would be more satisfactorily and equitably served if this respondent be given an early opportunity for a trial upon the merits in this cause.

Respondent therefore respectfully submits and prays that this writ of certiorari be denied.

E. L. WESTBROOKE,
Jonesboro, Arkansas,
Attorney for Respondent.

ROY SIGLER,
Jonesboro, Arkansas,

W. CLIFTON BANTA,
Charleston, Missouri,

J. M. HAW,
Charleston, Missouri,
Of Counsel.

(21)

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 877.

H. HIGHFILL AND VALLEY CREDIT COMPANY, A CORPORATION, PETITIONERS,

VS.

LULU J. DILATUSH, RESPONDENT.

BRIEF.

Brief of Petitioners in Reply to That of Respondent in Opposition to the Issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

ARCHER WHEATLEY,
Jonesboro, Arkansas,
Attorney for Petitioners.

HERBERT GANNAWAY,
Memphis, Tennessee,
Of Counsel.

INDEX

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 877.

H. HIGHFILL AND VALLEY CREDIT COMPANY, A CORPORATION, PETITIONERS,

VS.

LULU J. DILATUSH, RESPONDENT.

BRIEF.

Brief of Petitioners in Reply to That of Respondent in Opposition to the Issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

I.

ARGUMENT.

1.

The Desire of R. E. Dilatush That Respondent Obtain Judgment Is Conceded.

Respondent on page 4 (point 2) of her Brief concedes that R. E. Dilatush, although sued by Respondent

on a charge of fraud, wishes her as plaintiff to recover a judgment. This should be sufficient to dissipate any thought of there being a "controversy" between plaintiff mother and defendant son. The facts, however, go much farther, as established by the evidence of Respondent, her attorney, and her son. The sworn testimony of these three persons shows without any dispute whatever:

a. R. E. Dilatush selected his own attorney to file this suit against himself (Rec. 25).

b. R. E. Dilatush gave this attorney the statement of facts on which the complaint was framed (Rec. 25).

c. R. E. Dilatush turned his files over to Respondent or her attorneys (Rec. 25).

d. R. E. Dilatush voluntarily traveled from California to Arkansas to testify for Respondent (Rec. 14).

e. Respondent testified that she relied on R. E. Dilatush to establish her case (Rec. 30).

f. Respondent testified that R. E. Dilatush "has looked after this litigation for me" (Rec. 30).

A prayer for judgment against R. E. Dilatush under the circumstances is only a pretense of "controversy" which this Court will not permit to override the "realities of the record."

2.

Respondent's Argument Is an Unfair Attempt to Arouse Prejudice.

Petitioners unequivocally deny all charges of fraud and of indebtedness. R. E. Dilatush, authorized by Respondent to "look after all her business affairs" (Rec. 28) helped make the sale of the land in question. Ap-

plication of the proceeds on what he owed Valley Credit Company left him still in debt to the company he now accuses of fraud (Rec. 35). Is it likely that petitioners would have advanced him so much with a realization of additional indebtedness of $23,000 and interest to his mother? Mr. Highfill testified:

> "There was never any agreement made to reimburse Mrs. Lulu Dilatush or pay her anything in connection with the notes. We would not have considered the transaction at all if there had been any suggestion that we would be liable to her for the notes" (Rec. 38). "Nothing was said in our conversation with reference to reimbursing his mother. He said he could arrange that. He said he could deliver the notes" (Rec. 37).

Beyond cavil, at that time, everything was gratefully accepted as being for the benefit of R. E. Dilatush rather than for petitioners' gain. The land had been sold under execution for a nominal sum, and his title was gone. The Valley Credit Company liens were all prior to that of Respondent (Rec. 36-38). Valley could have foreclosed and have wiped out Respondent's lien, and have had the land, or have forced her to pay their liens off. Instead, R. E. Dilatush was given a new opportunity to operate the land. Certainly, this was for his benefit.

This statement, while outside the jurisdictional question at issue, is in reply to Respondent's effort to arouse prejudice against petitioners.

II.

CONCLUSION.

The determination of whether there is a sufficient controversy to support Federal jurisdiction should not be influenced by ineffectual attempts to obtain jurisdiction elsewhere. During all this time petitioners could have been sued in Mississippi County, Arkansas, where they were doing business.

Defendants in a Federal Court are not required to keep in their midst one whose activity in behalf of their opponent makes him in effect a legal saboteur. This is the holding of the cases on which petitioners rely, and is the justification for the Petition.

Petitioners therefore respectfully renew their plea for the issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

ARCHER WHEATLEY,
Jonesboro, Arkansas,
Attorney for Petitioners.

HERBERT GANNAWAY,
Memphis, Tennessee,
Of Counsel.